

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**Nashville, Tennessee**

**October 23, 2002**

**IN RE:**

**PETITION OF TENNESSEE UNE-P  
COALITION TO OPEN A CONTESTED  
CASE PROCEEDING TO DECLARE  
SWITCHING AN UNRESTRICTED  
UNBUNDLED NETWORK ELEMENT**

**DOCKET NO.  
02-00207**

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**ORDER ON OCTOBER 2, 2002 STATUS CONFERENCE  
AND SUBSEQUENT FILINGS**

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This docket came before the Pre-Hearing Officer to resolve certain discovery disputes. The specific disputes were addressed in numerous filings and during a status conference on October 2, 2002. The history of the disputes and findings and conclusions are set forth below.

**I. RELEVANT PROCEDURAL HISTORY**

**A. Pre-Status Conference History**

On May 24, 2002, BellSouth Telecommunications, Inc. ("BellSouth") filed the first set of discovery requests it had sent to the Association of Communication Enterprises ("ASCENT")<sup>1</sup> and to certain non-party competing local exchange carriers ("CLECs"), including Adelphia Business Solutions, Inc., XO Communications, Inc., Network Telephone, and Business Telecom, Inc. On May 31, 2002, ASCENT and Network Telephone each filed objections to BellSouth's

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<sup>1</sup> According to its petition to intervene, ASCENT is a "national industry organization representing more than 500 telecommunications service providers and suppliers throughout the United States." *Petition to Intervene of the Association of Communications Enterprises*, p. 1 (Mar. 1, 2002).

discovery requests. On June 5, 2002, Business Telecom, Inc., Adelphia Business Solutions, Inc., and XO Tennessee, Inc. each filed objections to BellSouth's discovery requests.

On June 11, 2002, BellSouth filed *BellSouth Telecommunications, Inc.'s Response to Objections Raised by ASCENT* asserting that ASCENT should respond to its requests numbered 1 through 13 and *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests From Third Parties: Network Telephone, Business Telecom, Inc., Adelphia Business Solutions, and XO Tennessee, Inc.* asserting that these non-party CLECs should be compelled to respond to BellSouth's requests numbered 1 through 8. On June 20, 2002, ASCENT filed a responsive letter, and on June 21, 2002, XO Tennessee, Inc. and Business Telecom, Inc. filed a response to BellSouth's motion to compel.

On June 28, 2002, the Pre-Hearing Officer<sup>2</sup> issued the *Initial Order Resolving Discovery Disputes*. The Pre-Hearing Officer directed ASCENT to respond to the discovery requests as follows:

The Association of Communication Enterprises shall respond to discovery request number 1 to the extent it asks the Association of Communication Enterprises to identify its members, request numbers 7 and 12 to the extent that each inquires as to Association of Communication Enterprises' contentions in this docket and requests the facts and documents supporting those contentions; and request number 13 to the extent that it relates to request numbers 1, 7, and 12. The Association of Communication Enterprises shall not present any evidence or testimony in this docket that would have been responsive to the discovery requests for which the Association of Communication Enterprises contends that it does not maintain information.<sup>3</sup>

As to Adelphia Business Solutions, Inc., XO Tennessee, Inc., Network Telephone, and Business Telecom, Inc., the Pre-Hearing Officer found:

Although the discovery requests submitted by BellSouth were issued in good faith, the Hearing Officer concludes that BellSouth's motion to compel should be

<sup>2</sup> At this time former Director Melvin J. Malone was acting as the Pre-Hearing Officer. Director Malone's term as a director of the Tennessee Regulatory Authority expired on June 30, 2002.

<sup>3</sup> *Initial Order Resolving Discovery Disputes*, pp. 22-23 (Jun. 28, 2002).

denied. Instead, the Authority should promulgate data requests to issue to Network Telephone Corp., Business Telecom, Inc., XO Tennessee, Inc., ABS Nashville, and any other CLEC which the Authority determines should respond. Further, in responding to the data requests, a non-party shall file a Proprietary Version of its response with the Authority as well as a Redacted Version. The Proprietary Version shall be filed in a sealed envelope, shall contain on the outside of the envelope a designation that the information is protected pursuant to the terms of this order, shall be maintained in the Office of the Executive Secretary, and shall be available only to members of the Authority. In the Redacted Version, the non-party may redact only its name and any other identifying information such as its address, phone number, and attorney. The Redacted Version shall be filed in the Office of the Executive Secretary and shall be served on all parties to this docket.<sup>4</sup>

On September 13, 2002, Director Ron Jones, acting as the Pre-Hearing Officer<sup>5</sup> entered an *Order Denying Motion to Hold Proceeding in Abeyance and Granting Motion for Reconsideration or Clarification*. In the order, the Pre-Hearing Officer held that the data requests described in the *Initial Order Resolving Discovery Disputes* should issue by September 18, 2002 and that all entities receiving such requests should respond by September 25, 2002. Further, the Pre-Hearing Officer noted that those entities receiving data requests that are not parties to the docket should respond in accordance with the *Initial Order Resolving Discovery Disputes*. The Pre-Hearing Officer also scheduled a status conference for October 2, 2002 to determine whether further discovery is necessary and to establish a procedural schedule.<sup>6</sup>

On September 18, 2002, the Tennessee Regulatory Authority ("Authority") sent data requests to Adelphia Business Solutions, Inc., XO Tennessee, Inc., Network Telephone, and Business Telecom, Inc. On September 24, 2002, XO Tennessee, Inc. filed a *Petition to Reconsider and Request for Additional Time to Respond to Data Requests*. In its filing, XO

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<sup>4</sup> *Id.* at 15-16.

<sup>5</sup> During the July 23, 2002 Authority Conference, a panel of the Tennessee Regulatory Authority consisting of Chairman Sara Kyle and Directors Deborah Taylor Tate and Ron Jones unanimously voted to appoint Director Ron Jones as the Pre-Hearing Officer.

<sup>6</sup> *Order Denying Motion to Hold Proceeding in Abeyance and Granting Motion for Reconsideration or Clarification*, pp. 14-15 (Sept. 13, 2002); *Erratum of September 13, 2002 Order* (Sept. 9, 2002).

Tennessee, Inc. requested an extension and sought reconsideration of the decision requiring the non-parties to respond in accordance with the procedure set forth in the *Initial Order Resolving Discovery Disputes*. On September 25, 2002, XO Tennessee, Inc. filed a letter in further support of its petition and also raised an issue as to whether the Authority should have sent requests to all CLECs. On that same day, Business Telecom, Inc. filed a request for extension.

On September 25, 2002, the Pre-Hearing Officer entered an *Order Granting Extension, Setting a Response Date, and Relieving Parties of a Filing Requirement*. The Pre-Hearing Officer granted all non-party CLECs an extension, but did not set a date for the filing of responses. Instead, the Pre-Hearing Officer held that a due date would be determined at the October 2, 2002 status conference. Further, the Pre-Hearing Officer instructed that responses to XO Tennessee Inc.'s petition were to be filed by October 1, 2002.<sup>7</sup> BellSouth filed a timely response.

On September 26, 2002, BellSouth filed a letter it had sent to ASCENT asking ASCENT to notify BellSouth of when ASCENT would respond to BellSouth's discovery requests. ASCENT had not filed a response to BellSouth's letter as of October 2, 2002.

#### **B. October 2, 2002 Status Conference**

The Pre-Hearing Officer convened the status conference on October 2, 2002. Numerous entities participated in the status conference. The parties in attendance were:

**BellSouth Telecommunications, Inc.** – Guy Hicks, Esq. and Joelle Phillips, Esq., 333 Commerce Street, Suite 2101, Nashville, Tennessee 37201-330;

**NewSouth Communications, Corp; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; Access Integrated Networks, Inc.; MCImetro Access Transmission Services, LLC; MCIWorldCom Communications, Inc.; Z-Tel Communications, Inc; and AT&T Communications of the Southeast, Inc.**

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<sup>7</sup> *Order Granting Extension, Setting a Response Date, and Relieving Parties of a Filing Requirement*, p. 2 (Sept. 25, 2002).

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("UNE-P Coalition") – Henry Walker, Esq., Boulton, Cummings, Conners & Berry, PLC, 414 Union Street, Suite 1600, Nashville, Tennessee 37219; and

**Time Warner Telecom of the Mid-South, LP** ("Time Warner") – Charles B. Welch, Jr., Esq., Farris, Mathews, Branam, Bobango & Helen, P.L.C., 618 Church Street, Suite 300, Nashville, Tennessee 37219.

The non-party participants were represented as follows:

**XO Tennessee, Inc.** – Dana Shaffer, Esq., 105 Molloy Street, Nashville, Tennessee 37201;

**Network Telephone** – Margaret H. Ring, Director, 815 South Palafox Street, Pensacola, Florida 32501 (participating telephonically);

**Business Telecom, Inc.** – Charles B. Welch, Jr., Esq., Farris, Mathews, Branam, Bobango & Helen, P.L.C., 618 Church Street, Suite 300, Nashville, Tennessee 37219 (participating telephonically); and

**Adelphia Business Solutions, Inc.** – Terry Romine, Esq., One North Main Street, Coudersport, Pennsylvania 16915 (participating telephonically).

The first item addressed at the conference was the dispute over the non-party CLECs' responses to the data requests issued by the Authority on September 18, 2002. The concerns raised included the extent to which the non-party CLECs' identities should be protected and whether the data requests should be sent to all non-party CLECs. The Pre-Hearing Officer afforded each party and non-party an opportunity to comment on the concerns raised and to answer questions posed by the Pre-Hearing Officer. As a result of the extensive discussions and questioning, BellSouth, the UNE-P Coalition, and Time Warner agreed to enter into negotiations to determine whether they could stipulate to certain facts. It was agreed that entering into such stipulations could render the receipt of non-party CLEC responses unnecessary. The Pre-Hearing Officer explained that in drafting the stipulations, the parties should be sensitive to: (1) the desire of any company to protect its confidential information; (2) the fact that this dispute

involves non-parties and any requirements imposed on such entities should be the least invasive; and (3) the need for all parties to fully present their case.<sup>8</sup>

With the agreement of the parties, the Pre-Hearing Officer instructed BellSouth to submit draft stipulations to the UNE-P Coalition and Time Warner by October 4, 2002. Additionally, the UNE-P Coalition agreed to notify the Authority by Tuesday, October 8, 2002 of how long it anticipated the parties would need to reach agreement on the stipulations.

BellSouth, the UNE-P Coalition, and Time Warner also agreed that they would submit along with their stipulations proposed dates for bringing this docket to its conclusion. The Pre-Hearing Officer provided the following list of actions and events requiring dates: (1) the filing of supplemental direct testimony, if the parties deem such filings necessary; (2) the filing of rebuttal testimony; (3) a pre-hearing conference; and (4) a hearing on the merits.

The next matter addressed by the Pre-Hearing Officer was the failure of ASCENT to respond to BellSouth's data requests. The Pre-Hearing Officer asked BellSouth whether it had received a response from ASCENT to BellSouth's September 26, 2002 letter. BellSouth informed the Pre-Hearing Officer that it had not received any response. The Pre-Hearing Officer stated that the Authority would instruct ASCENT to respond to the September 26, 2002 letter by Friday, October 11, 2002.<sup>9</sup>

The Pre-Hearing Officer concluded the status conference by asking whether there were any remaining issues to be resolved. Hearing none, the Pre-Hearing Officer adjourned the conference.

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<sup>8</sup> Transcript of Proceedings, Oct. 2, 2002, p. 46 (Status Conference).

<sup>9</sup> ASCENT was not represented at the status conference.

### C. Post-Status Conference History

The Pre-Hearing Officer issued a notice after the status conference instructing ASCENT to file and serve on all parties of record by October 11, 2002 a response to BellSouth's letter dated September 26, 2002. ASCENT responded on October 11, 2002 by filing responses to BellSouth's first set of discovery requests.

On October 9, 2002, the UNE-P Coalition filed a letter stating that it had reviewed the stipulations proposed by BellSouth and concluded that "it appears that the parties will not be able to reach agreement on the stipulations."<sup>10</sup> In support of its conclusion, the UNE-P Coalition asserted that it was unable to independently verify some of the information related to CLEC switch locations and capabilities and that it cannot agree with certain stipulations because the stipulations are argumentative and unrelated to the BellSouth's discovery requests issued to the non-party CLECs. Despite its conclusions, the UNE-P Coalition stated that it would be willing to discuss the matter further at a conference.<sup>11</sup>

On October 10, 2002, BellSouth filed a response to the UNE-P Coalition's letter. BellSouth asserted that the UNE-P Coalition could verify switch locations and capabilities using the Local Exchange Routing Guide ("LERG").<sup>12</sup> BellSouth further asserted that its proposed stipulations are relevant to the issue in this docket and that it had intentionally proposed broad stipulations to avoid the need for discovery from non-party CLECs.<sup>13</sup> In conclusion, BellSouth suggested three alternatives: (1) ordering the UNE-P Coalition to propose stipulations for

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<sup>10</sup> Letter from the UNE-P Coalition to Director Ron Jones dated Oct. 8, 2002, p. 1 (Oct. 9, 2002).  
<sup>11</sup> *Id.*

<sup>12</sup> Letter from BellSouth Telecommunications, Inc. to Director Ron Jones dated Oct. 10, 2002, p. 1 (Oct. 10, 2002).  
<sup>13</sup> *Id.* at 2.

BellSouth's consideration; (2) accepting BellSouth's proposed stipulations; or (3) dismissing the UNE-P Coalition's petition.<sup>14</sup>

The UNE-P Coalition replied to BellSouth's letter on October 15, 2002. Reaffirming its previous assertions, the UNE-P Coalition contended that the LERG does not provide conclusive evidence of conventional switches.<sup>15</sup> Further, the UNE-P Coalition argued that BellSouth does not have a right to demand that the parties enter into stipulations and that BellSouth already has access to data concerning CLEC capabilities.<sup>16</sup>

BellSouth filed another letter on October 17, 2002. In this letter, BellSouth characterized the UNE-P Coalition's assertions regarding reliance upon the LERG as unreasonable.<sup>17</sup> BellSouth also asserted that it should have access to the non-party CLEC responses if the UNE-P Coalition intends to challenge BellSouth's assertion as to the number of CLEC switches as identified in the LERG.<sup>18</sup> Lastly, BellSouth noted that the UNE-P Coalition's refusal to participate in negotiations leaves the parties and non-parties in the same position as they were in at the October 2, 2002 Status Conference.<sup>19</sup>

## **II. FINDINGS AND CONCLUSIONS<sup>20</sup>**

While unfortunate, it is apparent that at this time the UNE-P Coalition and BellSouth are not likely to stipulate to facts sufficient to satisfy BellSouth's purported need for information nor is it likely that another status conference will bring these parties any closer together. It is the opinion of the Pre-Hearing Officer that this controversy should not be permitted to delay this

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<sup>14</sup> *Id.* at 3.

<sup>15</sup> Letter from the UNE-P Coalition to Director Ron Jones dated Oct. 15, 2002, p. 1 (Oct. 15, 2002).

<sup>16</sup> *Id.* at 2.

<sup>17</sup> Letter from BellSouth Telecommunications, Inc. to Director Ron Jones dated Oct. 17, 2002, p. 2 (Oct. 17, 2002).

<sup>18</sup> *Id.* at 2 & 3.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> At this time, it seems that the dispute between ASCENT and BellSouth has been resolved as a result of ASCENT filing responses to BellSouth's first set of discovery requests.



docket from moving forward any longer. Therefore, based upon the filings made prior to and after the October 2, 2002 status conference and the arguments presented during the October 2, 2002 status conference, the Pre-Hearing Officer makes the following findings and conclusions.

None of the entities providing input on this issue have disputed the applicability of the federal impair standard to this case.<sup>21</sup> In fact, the UNE-P Coalition acknowledged that it requested application of the federal impair standard in its petition which initiated this docket.<sup>22</sup> Moreover, the participants in the October 2, 2002 Status Conference did not deny that the requested information is relevant to the federal impair standard and, in certain instances, even argued that the information should be collected from all CLECs.<sup>23</sup>

The Pre-Hearing Officer finds that the information requested by the Authority is pertinent to the application of the federal impair standard, which requires consideration of the “availability of alternative elements outside the incumbent LEC’s network” and a determination of whether lack of access to the requested network element “materially diminishes a requesting carrier’s ability to provide the services it seeks to offer.”<sup>24</sup> Given the particular relevance of the requested information, the Pre-Hearing Officer concludes that the Authority will be in a better position to reach a final decision in this docket if it obtains the requested information and that the Authority should obtain such information from all facilities-based CLECs authorized to provide service in

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<sup>21</sup> 47 C.F.R. § 51.317(b); see 47 C.F.R. 51.317(c) (listing additional factors that may be considered).

<sup>22</sup> Transcript of Proceedings, Oct. 2, 2002, p. 38 (Status Conference).

<sup>23</sup> The UNE-P Coalition did not specifically state that switching information is relevant to the federal impair standard. Instead, it stated that it did not intend to base its argument on such information, but recognized that BellSouth could request the information to defend its position. *Id.* at 37-38. When asked whether they could provide a suggestion as to how the Authority should apply the federal impair standard absent obtaining the requested information from all CLECs, none of the non-party CLECs offered suggestions. Moreover, Adelphia Business Solutions, Network Telephone, and XO Tennessee, Inc. agreed that the information should be obtained from all CLECs. *Id.* at 32-37. BellSouth also agreed that the requests should be served on additional CLECs. *Id.* at 7-8.

<sup>24</sup> 47 C.F.R. § 51.317(b)(1).

the BellSouth Telecommunications, Inc. service area. Therefore, the Authority will send data requests to all such CLECs that have not previously received the requests.

Having reached the above conclusions, the next issue to resolve is in what form the CLECs should provide the information to the Authority and the parties to this docket. This issue was thoroughly discussed during the October 2, 2002 status conference. The non-party CLECs clearly argued in favor of the information being submitted to the Authority and the Authority then aggregating the data and forwarding the aggregated data to the parties.<sup>25</sup> In response, BellSouth argued that it would be prejudiced without access to the individual CLEC data, but admitted that it is difficult to articulate that prejudice at this time.<sup>26</sup> BellSouth asserted that it should be permitted to see the responses to the data requests before it should have to specifically demonstrate prejudice. Nevertheless, BellSouth asserted it could be prejudiced if the financial status of a specific CLEC were raised<sup>27</sup> or there were inconsistencies in the data provided by CLECs and data compiled by BellSouth.<sup>28</sup> As its proposed solution, BellSouth argued that the non-party CLECs should each submit their information pursuant to the terms of the protective order already entered in this case.<sup>29</sup> The UNE-P Coalition did not advocate any particular solution, but instead, asserted its neutrality.<sup>30</sup>

In order to provide guidance to the parties in their efforts to enter into stipulations, the Pre-Hearing Officer instructed the parties to be sensitive to: (1) the desire of any company to protect its confidential information; (2) the fact that this dispute involves non-parties and any requirements imposed on such entities should be the least invasive; and (3) the need for all

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<sup>25</sup> Transcript of Proceedings, Oct. 2, 2002, pp. 4-5, 33-34 (Status Conference).

<sup>26</sup> *Id.* at 8.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 14-15.

<sup>29</sup> *Id.* at 9, 12-13.

<sup>30</sup> *Id.* at 29.

parties to fully present their case.<sup>31</sup> Balancing these same considerations, the Pre-Hearing Officer finds that the non-party-CLECs should respond to the data requests as follows. First, the non-party CLECs will file complete responses with the Authority. The responses should be in a sealed envelope with a notation that the contents are protected pursuant to this order. The Authority is the only entity entitled to inspect the responses unless otherwise ordered. Second, a member of the Authority's staff will be designated to aggregate the data, prepare a matrix setting forth the aggregated data, and file the matrix in the docket.<sup>32</sup> This procedure does not preclude BellSouth from filing a motion demonstrating prejudice and requesting the terms of this order be modified to avoid such prejudice. This resolution ensures that confidential information is protected while at the same time respects the status of respondents as non-parties and preserves the opportunity for BellSouth to assert prejudice.

**IT IS THEREFORE ORDERED THAT:**

1. The Tennessee Regulatory Authority shall issue data requests to all facilities-based CLECs authorized to provide service in the BellSouth Telecommunications, Inc. service area and that have not previously received the data requests. The data requests shall be sent via U.S. mail and facsimile by **Friday, October 25, 2002**.

2. Responses to data requests issued on Friday, October 25, 2002 shall be filed by **Friday, November 8, 2002**. The responses shall be filed in sealed envelopes with a notation that the contents are protected pursuant to this order. No party may inspect the responses unless otherwise ordered.

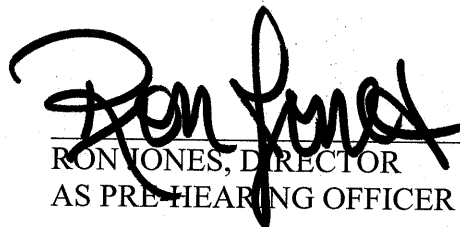
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<sup>31</sup> *Id.* at 46.

<sup>32</sup> Once the matrix is filed in the docket, the parties will be able to access it via the internet. XO Tennessee, Inc. had requested that once staff aggregates the data, the results should be protected under the terms of the protective order. *Petition to Reconsider and Request for Additional Time to Respond to Data Requests*, p. 3 (Sept. 24, 2002). XO Tennessee did not present any reason to justify granting this request. The sole purpose of aggregating the data is to conceal the CLECs' identities. Once aggregated, there is no reason to further protect the data under the protective order.

3. The Tennessee Regulatory Authority shall designate a staff member to aggregate the data contained in the responses and to file the aggregated data in the docket room by **Friday, November 15, 2002.**

4. The parties to this docket shall file agreed dates for the following actions and events by **Wednesday, November 20, 2002:** (1) the filing of supplemental direct testimony, if the parties deem such filings necessary; (2) the filing of rebuttal testimony; (3) a pre-hearing conference; and (4) a hearing on the merits.

  
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RON JONES, DIRECTOR  
AS PRE-HEARING OFFICER